LIBRARY
SUPREME COURT, U. S.

No. 723

FILED
FEB 13 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

FRED FRANKEN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

RUFUS D. MCLEAN,
Acting Assistant Attorney General,

BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

Avery v. *Alabama*, 308 U.S. 444	6
Isaacs v. *United States*, 159 U.S. 487	6

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 723

FRED FRANKEN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. III 4-7) is reported at 248 F. 2d 789.

JURISDICTION

The judgment of the Court of Appeals (R. III 7) was entered on October 18, 1957. A petition for rehearing was denied on November 19, 1957. The petition for a writ of certiorari was filed on January 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's motion for a continuance.

STATEMENT

On December 12, 1956, petitioner was indicted in the United States District Court for the Northern District of West Virginia for conspiracy to transport goods in interstate commerce knowing them to have been stolen (R. I 3-13; R. II 5). He was found guilty by a jury after a trial beginning on January 21, 1957, and ending on January 25, 1957. He was sentenced to 3 years imprisonment and a fine of $3,000.00 (R. I 1, 2).

The conspiracy charged in the indictment was to transport steel in mill width coils stolen from a West Virginia manufacturing company and to sell it in Pennsylvania and Chicago (R. I 3-5). Of the fourteen overt acts charged, nine (Nos. 1, 3, 4, 5, 6, 7, 8, 10, 11) charged that on a specific day petitioner's co-defendants (one the plant manager) stole a specified amount of steel from the mill, that petitioner arranged with a named carrier for the transportation thereof, and that he sold the steel to a named company. As to the remaining five overt acts charged, two alleged payments by petitioner to the co-defendants (Nos. 2, 9); two alleged the total sales of stolen steel to each of two customers (Nos. 12 and 13); the first one alleged the total payments by petitioner to the plant manager and co-defendant (No. 14). Petitioner's co-defendants pleaded guilty and testified

against him. Petitioner, on his own behalf, admitted making the sales and introduced in evidence receipts for money paid by one of his co-defendants (R. I 99-128). He admitted that he previously made a statement to Government agents concerning the amount of the sales and the company to whom sold (R. I 128). His defense was that he did not know the steel had been stolen (see R. I 131-132, 139).

At the opening of trial on Monday, January 21, 1957, petitioner made a motion for a continuance which was denied (R. I 15-21, 25).

The circumstances, as revealed by petitioner's motion (R. I 13-21) and the statements made on oral argument (R. II 4-10), are as follows:

Petitioner learned of the indictment returned in West Virginia on December 12, 1956, at his home in Youngstown, Ohio, on December 14, 1956 (R. I 16). He contacted his local Youngstown lawyer who arranged for an interview with the United States Attorney on January 4, 1957 (R. I, 16-17). Thereafter, petitioner consulted a West Virginia lawyer, Wesley Tinker, Jr., and was in the process of negotiating with him when petitioner was arraigned and pleaded not guilty on January 7, 1957 (R. I 17). On January 9, petitioner was informed that the trial would take place on January 21, 1957 (R. I 17).

Shortly after January 9, according to the judge's statement, he was called by Mr. Tinker, and when the judge told Mr. Tinker there would be no postponement of the trial date, Mr. Tinker said he could not represent petitioner because he could not complete his investigation in that time (R. II 5). Petitioner's

motion states that Mr. Tinker advised petitioner that he could not represent petitioner by reason of a death in Mr. Tinker's family on January 13, 1957 (R. I 17). Petitioner's counsel, Mr. Spillers, said that on January 14 (the day following the death of Mr. Tinker's father-in-law) Mr. Tinker approached him and said that for a good many reasons he could not represent petitioner and asked if Mr. Spillers' firm would take the case. Mr. Tinker told them of the court's refusal to grant an adjournment and turned over the results of his investigation which Mr. Spillers characterized as "quite considerable" (R. II 4, 6; see also R. II 10). Petitioner conferred with his new attorneys on the 16th or 17th, and they worked on the case over the week-end[1] (R. II 4).

During the oral argument, the court pointed out that the indictment had been returned five weeks before trial, that petitioner "had been anything but diligent in undertaking to secure counsel and get this case ready for trial" (R. II 8), and that to "wait until three or four days before a trial date to go out to engage counsel is certainly inexcusable negligence in the opinion of this court" (R. II 15). The court also pointed out that Mr. Spillers had served as a United States Attorney and, in argument on other motions in the morning, had displayed an intimate knowledge of the facts (R. II 15). The judge stated that he had been advised that the Government had a large number of

[1] The senior partner in the firm, Mr. Goodwin, was ill on the day of the trial, but Mr. Spillers disclaimed this as a ground for continuance (R. II 9); although at the afternoon session Mr. Goodwin's son pressed the point (R. II 11).

witnesses, brought from some distance at considerable expense, and that it would be difficult to get them back (R. II 16).

The judge also stated that, as to both sides, if there had not been the opportunity to confer with witnesses "that may be done, even at the cost of some delay or some recess or something of that kind that it may be necessary to have during the course of the trial" (R. II 17). The record reveals no such request by petitioner's attorney during the trial.

ARGUMENT

The facts set forth in the Statement fully answer petitioner's contention that the trial court abused its discretion in denying the motion for a continuance. They show, not only that petitioner was lax in attempting to engage counsel, but that in the end he did have the effective assistance of counsel who was in fact well prepared.

Although petitioner learned of the indictment on December 14, it was not until January 4 that he made a move to retain local counsel. Despite that fact, it is clear that his case was actually in the process of preparation from then on. Mr. Spillers admitted that Mr. Tinker, who later withdrew, had made a "considerable" investigation, the results of which were turned over to Mr. Spillers' firm.

Nor was the case really as complicated as the attorneys, in pressing their motion for a continuance, endeavored to make it appear. The overt acts charged in the indictment were, for the most part, sales about

which petitioner had previously made statements, concerning which he kept records, and which in fact he did not deny.[2] The only really contested issue was petitioner's knowledge of the fact that the steel was stolen. In this connection, on which the price paid had some bearing, the record shows that petitioner's counsel had previously requested petitioner to obtain, and petitioner did obtain, copies of the trade paper which would reflect the price of steel in the period in question (R. I 136). t is significant that there was no request for the limited recess which the court indicated it would grant if necessary. The record supports the conclusion that Mr. Spillers, a former United States Attorney, was well prepared to try the case.

The action of a trial court upon a motion for a continuance is a matter within its discretion and not subject to appellate review unless it be shown very clearly that the discretion has been abused. *Isaacs* v. *United States*, 159 U.S. 487; *Avery* v. *Alabama*, 308 U.S. 444. There was no abuse of discretion here.

---

[2] The Government of course had to prove the sales and the transportation, so that a number of witnesses were called on this issue (see R. II 18-31), but this was not the vital issue in the case.

[3] In the argument on the motion for a continuance, counsel had said that a Mr. Johnson of the Follansbee Steel Company was necessary and that he had then been unable to get him (R. II 9). It appears, however, that Mr. Johnson did testify (R. I 135). In addition, although it does not appear in the record, the Government's brief in the Court of Appeals shows at page 16 that petitioner had the benefit of witnesses from Steubenville, Ohio (Mr. Levkovitz), and Buffalo, New York (Mr. Gleason).

As the court below stated (Pet. 2a), since "it does not appear that there was any failure to secure proofs desired by [petitioner] or that [petitioner] was prejudiced in any other way by the refusal of the continuance, we certainly would not be justified in awarding a new trial on that ground."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys.

FEBRUARY 1958.